

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA) **Subcases 45-10803 (City of Oakley),**
) **45-13792 (Bedke) and 45-13793 (Bedke)**
Case No. 39576)
) **ORDER RE: MOTIONS FOR**
) **SUMMARY JUDGMENT and**
) **SPECIAL MASTER REPORT**
) **AND RECOMMENDATION**

FINDINGS OF FACT

45-13792

Bruce Bedke, 42 E. Basin Road, Oakley, Idaho, 83346, filed a *Notice of Claim to a Water Right* on May 24, 2004, in subcase 45-13792 claiming .23 cfs from a spring for year-'round stockwater use in Cassia County with a priority date of April 1, 1872, based on beneficial use. Under remarks, the *Notice of Claim* reads:

Point of redirection is from City of Oakley pipeline.
Claim 45-10508 split into two portions at request of claimant to reflect two points of diversion from City of Oakley pipeline. Claims 45-13792 & 45-13793 are limited to a diversion rate of .23 cfs.

45-13793

Bruce Bedke filed a second virtually identical claim the same date in subcase 45-13793, but with different points of diversion and place of use.

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report for Irrigation and Other, Reporting Area 10, IDWR Basin 45* on September 7, 2004. The Director recommended claims 45-13792 and 45-13793 be disallowed: "No lawful appropriation shown. This claim is a portion of former claim 45-10508."

Objections

On January 7, 2005, Bruce and Jared Bedke filed *Objections* essentially amending their two claims by stating the claims should be recommended as claimed, but with a priority date of January 1, 1955 for 45-13792 and April 1, 1964 for 45-13793.

On February 18, 2005, Weston Hawkes, Public Works Director for the City of Oakley wrote a letter to the SRBA Court in subcase 45-13793 recalling the history of a pipeline installed by the City in the 1930's and its water rights 45-1802, 45-1803 and 45-1804.¹ Mr. Hawkes concluded his letter by saying that "water right 45-13793 is not valid and should be disallowed." He attached a copy of the May 6, 1964 minutes of the Board of the Village of Oakley and the February 11, 2005 *Affidavit* of David N. Babbitt who was the City of Oakley Foreman/Public Works Director from June, 1980 to December, 1999.

NCAP

IDWR filed a *Notice of Completed Administrative Proceeding* on February 8, 2006, in subcase 45-13792 adding the name of Jared K. Bedke as claimant.

Responses

The City of Oakley filed *Responses* in subcases 45-13792 and 45-13793 on February 25, 2005, alleging the claimed water rights should not exist because the City possesses the water rights from which the claimed water rights stem: "[B]ecause Bruce Bedke's claimed water right is derived from the City of Oakley's pipeline it should be denied." The City also attached photocopies of the May 6, 1964 minutes of the Board of the Village of Oakley and the December 23, 2003 *Water Lease* between the City of Oakley and Wine Cup, Inc.

The United States of America, Department of Interior, Bureau of Land Management filed *Responses* in both subcases on March 10, 2005.

¹ Water rights 45-10802 and 45-10804 were partially decreed to the City of Oakley on May 13, 2005. Claim 45-10803 was recommended by IDWR to the City of Oakley, 200 W. Main, P.O. Box 266, Oakley, Idaho, 83346, for .45 cfs from groundwater (spring) for year-round municipal use in Cassia County with a priority date of January 1, 1930, based on beneficial use. IDWR identified 45-10803 as an overlapping uncontested claim with the Bedkes' claims 45-13792 and 45-13793.

Joint Statement of Facts

On April 10, 2006, the parties filed their *Joint Statement of Facts* subject to certain limitations:

For purposes of the *Joint Statement of Facts* regarding summary judgment in the above entitled cases, time, place, manner and quantity of diversion are not material because the only issue for summary judgment is whether or not Bruce Bedke can establish various water rights out of the City of Oakley's water pipeline [emphasis added].
Joint Statement of Facts, at 3.

The “Stipulated Facts” portion of the *Joint Statement of Facts* is relatively short and worth quoting in full:

1. General Facts

The City of Oakley possesses water rights (45-10802, 45-10803, 45-10804) which are derived from three spring sources: Cove Springs, Wildcat Springs, and Chokecherry Springs. Water from the springs is captured and flows through a City of Oakley water pipeline, and some of the water is sold to various users who have water lines that are connected to the City of Oakley's Pipeline. Two of the numerous water users who have water lines that are connected to the City of Oakley's pipeline are Bruce Bedke and Jared Bedke.

Water received by Bruce Bedke and Jared Bedke on water right claims 45-13792, and 45-13793 stem from water line connections with the City of Oakley's water pipeline.

2. Subcase No. 45-13792

The Bedkes use water from the City of Oakley's Pipeline to water their livestock under this claimed right (45-13792). Various grazers of the Goose Creek Group Allotment (#4027) installed several pipeline and water trough facilities throughout the allotment for the purpose of watering their livestock. Water to the troughs is currently being supplied by the City of Oakley's water pipeline, which water is diverted by the City of Oakley under water rights 45-10802, 45-10803, and 45-10804. This water is being delivered to the grazers pursuant to a 1955 agreement between the City of Oakley and the cattle grazers of the Goose Creek Group Allotment (#4027), of which Bruce Bedke and Jared Bedke are currently members. *See Exhibit “B”*, attached hereto and incorporated herewith.

3. Subcase No. 45-13793

In 1964 Bruce Bedke and Ray C. Bedke installed water troughs on certain private lands for the purpose of watering their livestock. The water troughs were placed in areas that had previously been without water, and

the pipeline servicing these troughs was tied into the City of Oakley's water main line, which diverts water under the City of Oakley's water rights (45-10802, 45-10803, and 45-10804).

In 1964 Ray C. Bedke petitioned the City of Oakley (at that time the Village of Oakley) See, Exhibit "A", Regular Minutes of the Village of Oakley Board, May 6, 1964, attached hereto and incorporated herewith, to allow him access to the City of Oakley's water on the same terms and conditions as are specified in a contract with a group of cattlemen known as the Goosecreek Cattlemen, See Exhibit "B", attached hereto and incorporated herewith. Ray C. Bedke subsequently paid for the water he received in accordance with the terms of the Goosecreek Cattlemen's Contract.

Prior to 1991, Bruce Bedke used the City of Oakley's water on the City's main water line in the same manner as Ray C. Bedke by paying the appropriate fees for such use. In 1991, the City of Oakley's water line was cut and capped by the City of Oakley immediately below the Bedkes' tie in due to surface water contamination of potable water issues. A new agreement was offered from the City of Oakley to Ray C. Bedke (now Winecup, Inc.) and Bruce Bedke for the delivery of non-potable water. Ray C. Bedke and Winecup, Inc., the entity succeeding him, signed the new agreement, See Exhibit "C", attached hereto and incorporated herewith. However, Bruce Bedke did not sign the new agreement. The water Winecup, Inc., receives from the City of Oakley pursuant to the contract contained in Exhibit "C", flows through the same water line connection that feeds Bruce Bedke's 45-13793 claim. The physical layout of the City of Oakley's pipeline is such that water delivered to Bruce Bedke cannot be turned off without also cutting off water delivery to Winecup, Inc. The Bedkes use water (claimed under water right 45 - 13793) from the City of Oakley's water line, which diverts water under the City of Oakley's water rights 45-10802, 45-10803, and 45-10804.

Joint Statement of Facts, at 3-5.

Attached to the *Joint Statement of Facts* are photocopies of: 1) the June 8, 1962 *Agreement* between the Village of Oakley and the Goose Creek Cattlemen; 2) the May 6, 1964 minutes of the Board of the Village of Oakley; and 3) the December 23, 2003 *Water Lease* between the City of Oakley and Wine Cup, Inc.

Motions for Summary Judgment

Bedke

Bruce and Jared Bedke filed their *Motions for Summary Judgment, Including Memorandum of Points and Authorities in Support* on May 19, 2006. The Bedkes argued

that the main issue is whether they “have valid water rights to certain springs located in the places described in the Bedkes’ Objections.” Though not stated by the parties, presumably those “certain springs” claimed by the Bedkes are the same three springs (Cove Springs, Wildcat Springs and Chokecherry Springs) whose water is captured and flows through the City of Oakley pipeline.

The Bedkes argued further that the parties’ *Joint Statement of Facts* establishes that 1) the water was clearly intended to be applied to a beneficial use (stockwater) and 2) the water was diverted from its natural watercourse. Finally, the Bedkes argued that the United States’ *Responses* “fail to even state a claim or allege any reason why the Bedkes’ Objections are not valid.”

City of Oakley

The City of Oakley filed its *Motion for Summary Judgment* and *Memorandum in Support of Summary Judgment* on May 19, 2006. It pointed out that the Bedkes receive water for their two claims (45-13792 and 45-13793) from connections with the City’s pipeline and argued that “none of the water claimed by the Bedkes flows in a natural channel or watercourse: it is water that flows from the end of a pipe.” *Memorandum in Support*, at 2. The City then suggested that there are two issues to be determined:

1. Whether a party may maintain an enforceable water right that does not flow in its natural watercourse, but instead flows out of the end of a city pipeline: and
2. Whether a party may appropriate water as a junior user that is leased, rented, or purchased from a party with a valid water right.

Memorandum in Support, at 3.

The City argued that the Bedkes can only appropriate unappropriated water flowing in a natural stream or natural channel and that precludes the Bedkes from claiming water 1) appropriated by the City, 2) flowing in the City’s pipeline and 3) sold and distributed to such users as the Bedkes.

Bedke Response

The Bedkes lodged their *Response to City of Oakley Motion for Summary Judgment* on June 30, 2006. The Bedkes first acknowledged that the City owns water rights 45-10802, 45-10803 and 45-10804 which are senior in priority to the Bedkes’ claims. They then argued that their claims

are not based upon any use of these rights, but rather a constitutional appropriation of the unappropriated water from these spring sources beginning in 1955 and 1964.

...

Clearly, it is possible that one can commingle water in an artificial conveyance then reclaim the water pursuant to State Law contrary to the assertion and only issue raised by the City of Oakley in their pleadings. It is possible to obtain such a conveyance right by many methods, including prescription [footnote omitted].

...

[T]he Bedkes' claims are based upon a constitutional appropriation of the unappropriated water from the spring sources beginning in 1955 and 1964 and not on any contractual relationships as argued by the City of Oakley.

Bedkes' Response, at 2-4.

United States Memorandum in Opposition

The United States lodged its *Memorandum in Opposition to Bedkes' Motion for Summary Judgment* on June 30, 2006. It argued that

[T]he Bedkes' claims to livestock water that is delivered to livestock watering troughs under the City's municipal water rights by connections to the City's pipeline are barred by Idaho law. There are no genuine issues of material fact for trial. Therefore, the City is entitled to judgment, as a matter of law, dismissing the Bedkes' objections to the IDWR's recommendations to disallow the Bedkes' livestock watering claims.

United States Memorandum, at 2.

City of Oakley Response Brief

The City of Oakley lodged its *Response Brief to Bedkes' Motion for Summary Judgment* on June 30, 2006. It argued that certain authorities cited by the Bedkes in support of their claims have no bearing in this case – instream stockwater diversion case law has no relation to the use of water from a municipality's pipeline.² The City concluded:

Given the unmistakable law and facts in this case, the Bedkes cannot point to any lawful appropriation of water flowing from its "natural" course. "Appropriating" water from a municipality's water source does not

² The Bedkes cited *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct. App., 1984), and SRBA Presiding Judge John M. Melanson's August 3, 2005 *Memorandum Decision and Order on Challenge*, subcase 55-10135 (Joyce Livestock), *et al.*

constitute appropriation from a natural course of water within the state of Idaho.

Response Brief, at 2-3.

Hearing on Cross Motions for Summary Judgment

A hearing on the Bedkes' and the City of Oakley's *Motions for Summary Judgment* was held by telephone on August 10, 2006. Bruce and Jared Bedke appeared *pro se*, along with Marty Bedke (Bruce Bedke's wife); David Heida appeared for the City of Oakley; and Larry A. Brown appeared for the United States. Following argument, the matter was taken under advisement.

CONCLUSIONS OF LAW

City of Oakley Pipeline

The parties agreed the City of Oakley diverts water from Cove Springs, Wildcat Springs and Chokecherry Springs and conveys it through its pipeline to the City's customers and municipal service area pursuant to three water rights (45-10802, 45-10803 and 45-10804). The total quantity of the City's three diversions through the pipeline is 1.56 cfs. There is no evidence of the capacity of the pipeline. All three of the City's water rights are for year-round municipal use with priority dates of 1895, 1904 and 1930. There seems to be no argument that the City holds these water rights for public use. See I.C. § 50-323.

Sources of the Bedkes' Claims

In their *Notices of Claims*, the Bedkes claimed the City of Oakley's diversion works as their "point of diversion" and the City's pipeline as their "point of rediversion" and they claimed the source for each claim as "spring tributary to sinks." The conclusion is that the Bedkes' two claims, "limited to a diversion rate of .23 cfs", are to two of the same springs appropriated by the City and that the water they claim is conveyed via the City's pipeline. That distinction is important because the Bedkes are not seeking to appropriate water from the City's pipeline, but rather water from springs diverted by the City and conveyed to the Bedkes' places of use via the City's pipeline.

The Bedkes' claimed rights are not based upon any use of these [the City of Oakley's] rights, but rather a constitutional appropriation of the unappropriated water from these spring sources beginning in 1955 and 1964.

...
Clearly, it is possible that one can commingle water in an artificial conveyance then reclaim the water pursuant to State Law. . . It is possible to obtain such a conveyance right by many methods, including prescription.

Bedkes' Response, at 2-3.

The issue becomes clearer when one recalls that the Bedkes originally claimed an 1872 priority date for both claims, predating all three of the City's water rights. Hence, the Bedkes claimed they appropriated water from the springs for stockwater use even before the City of Oakley built its pipeline.

But the issue became somewhat clouded when the Bedkes amended their claims via their *Objections* and asked for much later priority dates. In their *Objections*, the Bedkes stated their claims should be recommended as claimed, but with a priority date of 1955 for 45-13792 and 1964 for 45-13793 and they repeated their claimed sources as "spring." For that reason, it is reasonable to conclude that the Bedkes still claim water from the springs appropriated by the City of Oakley and that they claim their water is conveyed via the City's pipeline.

Water Delivery Agreements

There is no evidence the Bedkes constructed their own diversion works at the springs or constructed their own pipeline or ditch to convey water from the springs to their claimed places of use. In agreements with the City, they and others tapped into the City's pipeline and diverted water from the pipeline to collection boxes and troughs to water their livestock. Each customer paid for and maintains diversion works from the City's pipeline and meter to the customer's places of use and the customer pays a certain amount per gallons delivered each month.³ A brief review of the Bedkes' two claims

³ Based upon the *Joint Statement of Facts*, it is apparent that the Bedkes continue to pay monthly fees for water they receive for places of use under claim 45-13792, but **not** claim 45-13793. The Bedkes argued: [A]ll the waters used by the Bedkes' at this location [45-13793 place of use] since the capping in 1991 have been based upon a junior right, and they have not purchased water from that time forward to service this location. Because his use was now based upon his

might help explain their decision to amend their original claimed priority date of 1872 for both claims to the much later dates.

45-13792

Beginning in 1955, Bruce Bedke and the other Goose Creek Allotment grazers agreed with the City of Oakley to divert water from the City's pipeline to water troughs on the Allotment to water their livestock. Now the Bedkes seek a 1955 priority date for this claim.

45-13793

In 1964, Bruce and Ray Bedke installed troughs on private lands and under agreement with the City, tapped into the City's pipeline. The agreement was that the Bedkes would be delivered water on the same terms and conditions as the Goose Creek Cattlemen. Bruce Bedke received water from the pipeline and paid the appropriate fees until 1991, when the City's water line was cut and capped below the Bedkes' tie-in due to surface water contamination. When the City offered a new contract for non-potable water, Bruce Bedke would not agree but because of the layout of the pipeline, water delivered to Bruce Bedke cannot be turned off. The Bedkes seek a 1964 priority date for this claim.

The Issues

It will be recalled that in the parties' *Joint Statement of Facts*, they agreed the only issue for summary judgment is whether Bruce Bedke can establish various water rights out of the City of Oakley's water pipeline. The short answer is, no. The long answer requires a fuller review of two distinct issues: 1) Can the Bedkes lawfully appropriate water from the springs by claiming the City of Oakley's diversion works as their point of diversion and the City's pipeline as their point of rediversion?, and assuming *arguendo* that the Bedkes have lawfully appropriated water from the springs, 2) can the Bedkes acquire conveyance rights in the City's pipeline by prescription?

vested junior right, Bruce Bedke also declined to sign a modified agreement for the delivery of non-potable water with the City of Oakley, electing instead to rely solely upon his junior right.

Bedkes' Response, at 5.

Appropriation of Water

The Bedkes correctly cited the law of the SRBA case regarding appropriation of beneficial use instream stockwater rights:

The requirements for establishing a beneficial use water right consist of intent to apply water to a beneficial use, diversion from a natural watercourse, and the application of the water to a beneficial use. . . . Although, no diversion is required for purposes of establishing an instream stockwater right, the other two requirements, intent to apply to a beneficial use and application to a beneficial purpose, still apply. As with the situation of a diversionary right, the requisite intent to apply the water to a beneficial use can be inferred from the overt act of grazing livestock in a particular area and the livestock drinking water from available sources.

Bedkes' Motions for Summary Judgment, at 2-3, quoting from SRBA Presiding Judge John M. Melanson's August 3, 2005 *Memorandum Decision and Order on Challenge*, subcase 55-10135 (Joyce Livestock), *et al.* at 13-14.

The above decision is of no avail to the Bedkes' claims for two compelling reasons. First, the Bedkes have not claimed instream stockwater rights. Instead, they claimed water sources distant from where the water is consumed by their livestock. There is no stream and the place of use (where the livestock drink the water) is not *in situ* as required for instream stockwater use claims. Second, the Bedkes did not divert the water from its sources. Remember, the Bedkes did not claim the City's pipeline as the source – they claimed “spring” as the source for each claim. The City diverted the water and the Bedkes are merely “piggy backing” their claim on another's diversion works.

The inevitable conclusion is that the Bedkes cannot lawfully appropriate the water from the springs by claiming the City's diversion works as their point of diversion and the City's pipeline as their point of rediversion. While the Bedkes may have had the requisite intent to apply the water to a beneficial use, they failed to prove they diverted water from Dove Springs, Wildcat Springs and Chokecherry Springs. The City diverted the water flowing in its pipeline for a public use and the Bedkes are no more than “customers” of the City when they draw water from the pipeline to water their livestock.

Prescriptive Easement

The Bedkes argued that it is possible for them to have obtained some sort of conveyance right in the City's pipeline to transport water they allegedly appropriated

from the springs to their places of use. They suggested prescription as one possibility, but failed to mention any other possibilities. In any event, what the Bedkes suggested is a prescriptive easement by adverse possession or use. See I.C. § 5-209.

Prescriptive easement is defined as “an easement created from an open, adverse, and continuous use over a statutory period.” *Black’s Law Dictionary* 550 (Bryan A. Garner ed., 8th ed., Thomson West 2004).

The first rule of law in this area is that a prescriptive easement cannot be obtained if use of the servient estate is by permission of the owner. *Christle v. Scott*, 110 Idaho 829, 718 P.2d 1267 (Ct. App. 1986), and *Hughes v. Fisher*, 142 Idaho 474, 129 P. 3d 1223 (2006). Second, property held by a municipality in trust for public use cannot be acquired by adverse possession or prescription. R.P. Davis, *Adverse Possession – Public Property*, 55 A.L.R. 2d 554, 612 (1955) and 3 Am. Jur. 2d *Adverse Possession* § 270 (2002).

Permissive Use

The Bedkes claimed as their priority dates 1955 (45-13792) and 1964 (45-13793). Those dates happen to coincide with the dates when Ray Bedke constructed water troughs and tapped into the City of Oakley’s pipeline to water his livestock. Mr. Bedke’s diversions were made under various agreements over the years between him (and others) and the City. The record indicates that Mr. Bedke received the benefit of the City’s water and paid the appropriate fees over the years and continues to do so under 45-13792, but not 45-13793. What is significant is that Mr. Bedke only stopped paying for water under 45-13793 in 1991, after the City capped the pipeline below Mr. Bedke’s tie-in. That implies that he recognized his status as a customer under both claims until 1991, yet he claimed priority dates as much as 36 years earlier. In other words, Mr. Bedke claimed to be receiving “his” water while at the same time acknowledging he received the water with permission of the City and paid its fees.

While the Bedkes may now argue they used the City’s water continuously since 1955 and 1964, they cannot reasonably argue that their use of the water or the City’s pipeline was open and adverse. Their use of both was by permission of the owner and therefore, the Bedkes’ claim of a prescriptive easement must fail.

Bar to Prescriptive Easement

The Bedkes' claim of prescriptive easement must also fail because property held by a municipality in trust for public use cannot be acquired by adverse possession or prescription. They cited *Ramseyer v. Jamerson*, 78 Idaho 504, 305 P.2d 1088 (1957), as holding that an easement for the flow of water through a ditch or other artificial structure upon the land of another may be acquired by prescription. *Bedkes' Response*, at 3. What the Bedkes failed to note in *Ramseyer* is that such holding applies solely to *privately owned* ditches or artificial structures.

Idaho has followed the general rule that property held by a municipality in trust for public use cannot be acquired by adverse possession or prescription. In *Hellerud v. Hauck*, 52 Idaho 226, 13 P.2d 1099 (1932), the Idaho Supreme Court held that in the absence of a statute making the state subject to the statute of limitations, no title by adverse possession can be acquired against the state no matter how long the adverse occupancy. There are no cases suggesting the same reasoning does not apply to municipalities and the Bedkes have not pointed to any statute exempting the state or municipalities from the general rule.

The Bedkes' beneficial use stockwater claims 45-13792 and 45-13793 to spring water out of the City of Oakley's water pipeline are not valid. The Bedkes cannot lawfully appropriate water from Cove Springs, Wildcat Springs and Chokecherry Springs by claiming the City of Oakley's diversion works as their point of diversion and the City's pipeline as their point of redirection. Further, the Bedkes cannot acquire conveyance rights in the City's pipeline by prescription. The Special Master agrees with IDWR's recommendations that the claims be denied.

ORDER

THEREFORE, IT IS ORDERED that:

1. The Bedkes' *Motions for Summary Judgment* are **denied**, and
2. The City of Oakley's *Motion for Summary Judgment* is **granted**.

